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IN THE UTAH COURT OF APPEALS

DESIREE ANN CLIMINS, f/a DESIREE
ANN TILLER,

Plaintiff/Appellee,

vs

TIMOTHY W. TILLER,

Defendant/Appellant.

Appellate No. 990634-CA

Argument Priority No. 5

REPLY BRIEF OF APPELLANT

Appeal from the Order of the District Court of the Fifth Judicial District,
the Honorable James L. Shumate, Presiding,
entered June 22, 1999.

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FILED

Utah Court of Appeals

APR 26 2000

Julia D'Alessandro
Clerk of the Court

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I. SUMMARY OF ARGUMENT

Plaintiff apparently misunderstands the basis of the Defendant's appeal in this matter. The Defendant has not challenged the Court's specific Findings of Fact. Defendant challenges the Court's application of those facts to a determination of custody. In essence, the thrust of the Defendant's appeal is that the Court's award of custody to the Plaintiff, based on a finding of prior abuse that had no relevance to the Defendant's ability to care for the child is, in essence, a punishment of the Defendant instead an award of custody based on the best interests of the child. The trial court did not assign the appropriate significance to continuing the stable environment the Defendant had been providing for the child for a substantial period of time prior to trial, while the child had been living in his home.

Since the Defendant does not challenge the Court's specific factual findings, there is no need to martial the evidence. The error in this case is not in the Court's factual findings, but is in the Court's application of those findings to the ultimate issue, that is, an award of custody based on the child's best interests.

II. ARGUMENT

A. THE PLAINTIFF'S ARGUMENT THAT THE DEFENDANT'S BRIEF SHOULD BE STRICKEN FOR FAILURE TO MARTIAL ALL OF THE EVIDENCE MISINTERPRETS THE BASIS FOR THE DEFENDANT'S APPEAL.

The Defendant does not attack the Court's factual findings. In his initial brief, the Defendant discusses the factors which the trial court should consider in determining the child's best interest prior to awarding custody, as set forth in *Hutchinson v. Hutchinson*, 649 P.2d 38 (Utah 1982). The custody evaluator addressed those issues. The trial court addressed those issues. However, the trial court determined, that, with reference to nine of the issues, the evidence was "evenly based" (Transcript of Trial, hereinafter "T" at 869-871, R at 383-384).

Even with regard to the issue of abuse, the Court did not find that the child would be in danger of abuse at the hands of either party. In fact, the Court specifically found that, whatever abuse had been inflicted on the child in the past would not “ever happen again”. The Court specifically stated “the Court is certain and convinced that, as of the date of trial, the Defendant would never raise his hand to this child in that fashion ever again.” (R. at 385). Despite this finding, the trial court ruled that this factor tipped the scales in favor of awarding custody to the Plaintiff. (R. at 385).

The Defendant does not challenge the Court’s factual findings with regard to the factors identified in Hutchinson v. Hutchinson and set forth in Rule 4-903 of the Utah Code of Judicial Administration. Therefore, there is no need to martial the evidence. The basis of the Defendant’s appeal is that the Court improperly awarded custody based on a factor which the Court specifically found was not relevant to the ongoing best interests of the child.

Abuse may or may not have occurred. The trial court found that it did. For purposes of this appeal, the Defendant does not challenge that finding. The Defendant, however, challenges the Court’s award of custody based on prior abuse where the Court is “certain and convinced that as of the date of the trial, Defendant would never raise his hand to this child in that fashion ever again.” . . . and that “it is not abuse that would never happen again.” (R. at 385).

As Defendant demonstrated in his principal brief, discussing the cases of Hudema v. Carpenter, 989 P.2d 491 (Utah App. 1989) In the Interest of JJT and TJT, 877 P.2d 161 (Utah App. 1994), Shioji v. Shioji, 712 P.2d 1997 (Utah 1995), and Layton v. Layton, an unpublished opinion from the Mississippi Court of Appeals, No. 90-CA-00936 COA, 1998 Miss. App. Lexis 574 (Miss. App.1998) [incorrectly cited in the Table of Contents of Appellant’s Brief as a Minnesota Court of Appeals case], factors relating to the custodial parent, including, but not

limited to moral character, religious compatibility, and the use of corporal punishment, are relevant only to the extent those aspects of the prospective custodial parent's character affect the child's best interests. In light of the Court's finding that the past abuse would never happen again, the past abuse does not affect the child's best interests, and should not have been the pivotal factor on which the Court based its decision to award custody.

B. THE TRIAL COURT ERRED IN NOT CONTINUING THE THEN EXISTING STABLE ENVIRONMENT ENJOYED BY THE PARTIES' CHILD IN THE DEFENDANT'S HOME.

Since the parties were on an equal footing with regard to all of the factors discussed by the Court which relate to the fitness of the parties to serve as parents at the time of trial, the pivotal factor, on which the trial court should have based its award of custody, is the factor discussed at length in *Elmer v. Elmer*, 776 P.2d 599 (Utah 1989)... "stability." In this case the trial court did not even discuss the issue of stability, although the evidence established that the child had been in the Defendant's home for a substantial period of time prior to trial and that the child had been doing well in that environment. He was bonded to his stepbrother and sister and to his stepmother. That stable custody arrangement should have been the deciding factor in this admittedly close case. Custody should have been awarded to the Defendant so as to continue that custodial arrangement not just to make a temporary order permanent but in recognition of the reality of the circumstances affecting the child.

The Petitioner is correct in her argument that temporary custody is not to be treated as permanent custody. However, the trial court cannot ignore the existing custody arrangements at the time a custody dispute comes before the court for trial. Where, as here, the child had been in the Defendant's home and a member of his family since the date these proceedings commenced, in late 1996, except for a brief visit with his mother in Virginia in early 1997 and during the

summer of 1998, that custody arrangement, consistent with Elmer, must be given substantial weight if the child is doing well in that home. In this case, keeping Tristan in the “warm, safe, comfortable environment” that existed in the Defendant’s home (T. at 106), and keeping Tristan in the same school where he had been attending (T. at 119), are factors that not only must be considered but, where the parties are even an all other function-related factors, mandates an award of custody to the Defendant.

The continuity and stability which Tristan had been enjoying in the Defendant’s home should have continued. The Court cited to function related factor that justified removing him from the Defendant’s home, where he had lived for almost two years, and removing him from that home to face an uncertain future with his mother in Europe, except the opportunity to see the world. An opportunity to travel would exist were the child to move to Europe with his mother but there was no evidence to suggest that this “other factor” would be sufficiently compelling to override stability and continuity. See Elmer at 604-605. The trial court’s decision awarding custody to the Plaintiff should be reversed and an Order should be entered awarding custody of the child to the Defendant, in order to preserve the stability Tristan had been enjoying prior to trial.

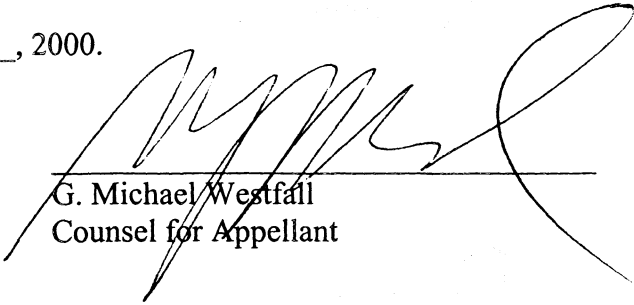
CONCLUSION

The Defendant did not marshal evidence in opposition to the trial court’s findings because the Defendant’s Appeal does not attack the trial court’s findings. The Defendant’s Appeal is based on the trial court’s application of the facts to the ultimate issue.

The trial court having found that all of the function-related factors, with the exception of continuing the then existing stable custodial arrangement, were equal, and the evidence establishing that the home in which Tristan had been living prior to trial, with the Defendant, was

a stable, nurturing environment, custody should have been awarded to the Defendant so as to continue that stable environment for the child.

DATED this 26th day of April, 2000.



G. Michael Westfall
Counsel for Appellant

I, G. Michael Westfall, certify that on the ____ day of _____ 2000, I served two copies of the attached Reply Brief of Appellant upon R. Clayton Huntsman, the counsel for the Appellee in this matter, by mailing it to him by U.S. first class mail with sufficient postage prepaid to the following address:

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